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No. 82-68

In the Supreme Court of the United States

October Term, 1982

SWIFT AGRICULTURAL CHEMICALS CORPORATION,
Petitioner,

vs.

FARMLAND INDUSTRIES, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether a question is raised of such substantial, significant and pervading public policy, and of such broad applicability that review by this Court is mandated, where the decision of the Tenth Circuit Court of Appeals holding a patent on a process for producing ammonium polyphosphate fertilizer invalid and not infringed is based on extensive, unrebutted evidence that:

(a) The superphosphoric acid starting material used by respondents is not the phosphoric acid claimed by the patentee;

(b) The process contact time interpretation asserted by the patentee for the first time in this action renders the claims fully anticipated by as well as obvious in view of the prior art;

(c) The prior *Usamex* decision which petitioner contends is contrary was by a District Court, *not* another Court of Appeals and was rendered without application of petitioner's now asserted residence time interpretation to the prior art;

(d) The purportedly critical contact time was in fact demonstrated to be old by way of new evidence in this case not considered in the *Usamex* case; and

(e) Petitioner's so-called commercial process under the patent is a dismal failure producing only a product characterized by petitioner's own documents to be "horrible . . . junk" and "consistently . . . inferior".

TABLE OF CONTENTS

COUNTER STATEMENT OF QUESTION PRESENTED 1

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. There Is No Conflict Between The Circuits 5

II. This Case Presents No Issues Of Broad Applicability 9

III. Petitioner's Assertion Of Denial Of Due Process Is Baseless 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Brunswick Corp. v. Outboard Marine Corp., 297 F. Supp. 373, 374 (D.C. Wis. 1969) 11

Imperial Stone Cutters, Inc. v. Schwartz, 370 F.2d 425 (8th Cir. 1966) 7

Johns-Manville Corp. v. Cement Asbestos Products Company, 428 F.2d 1381 (5th Cir. 1970) 7

Mast, Foos & Company v. Stover Manufacturing Company, 177 U.S. 485, 488-89 (1900) 6

Phillips Electronic and Pharmaceutical Industries Corp. v. Thermal and Electronics Industries, Inc., 450 F.2d 1164, 1176 (3rd Cir. 1971) 7

Smith v. Hall, 301 U.S. 216, 218 (1937) 7

Smith v. Snow, 294 U.S. 1 (1934) 7

Sterling Aluminum Products, Inc. v. Bohm Aluminum and Brass Corp., 187 F.Supp. 879, 882 (D.C. Mich. 1960), aff'd 298 F.2d 538 (6th Cir. 1962) 11

Other Authorities

Federal Rules of Civil Procedure, Rule 60(b) 4, 5
Supreme Court Rule 17 ..... 5, 6

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COUNTER STATEMENT OF THE CASE

The major market for synthetic fertilizers in this country has always been solids; however, so-called liquid fertilizers are preferred in limited instances because of ease of application under certain conditions. (App. 3a)

One type of liquid can be produced by reacting ammonia with phosphoric acid to produce a product known as ammonium polyphosphate (APP). For reasons of economy, phosphate rock is used to prepare so-called wet process orthophosphoric acid as the acid reactant notwithstanding the fact that the resulting acid contains substantial amounts of metallic impurities. However, when

wet process orthophosophoric acid is neutralized with ammonia to produce liquid fertilizer, the impurities tend to drop out as gelatinous, sludge-like precipitates. (App. 48a)

The Tennessee Valley Authority in the 50's demonstrated that if wet process phosphoric acid is heated to molecularly dehydrate the acid and convert a portion to polyphosphoric form, the resulting "superphosphoric" acid (SPA) would sequester or hold the metallic impurities in suspension upon neutralization of the acid with ammonia to produce APP. (App. 74a) In the late 50's and early 60's, Getsinger of TVA showed that the use of SPA could be eliminated by utilizing "the free heat of ammoniation to evaporate water and thereby condense the acid" to form APP on a continuous basis, thus accomplishing the dual functions of "ammoniation and concentration simultaneously instead of using two separate processes". (App. 75a)

Kearns in the patent here in suit suggested preparation of APP by reacting ammonia with 54%-68% P_2O_5 wet process orthophosphoric acid on a continuous basis in an elongated tubular reactor under conditions such that the exothermic reaction condensed the acid whereby simultaneous neutralization and molecular dehydration occurred in the same manner previously described by Getsinger. Kearns' asserted improvement related to limiting the contact time between the ammonia and phosphoric acid in the tubular reactor to a period of "less than one second". (App. 98a) The contact time was said to be a critical factor to avoid formation of highly insoluble tripoly and metaphosphates.

Petitioner brought suit in 1974 in the District Court for the Eastern District of Louisiana, charging that Usamex, a United States corporation, and its Mexican parent Fertilizantes Fosfatados Mexicanos, S.A. had violated the

Kearns patent. Usamex reacted 60% P_2O_5 orthophosphoric acid with ammonia in an elongated reactor. Usamex did not argue during the initial Louisiana litigation that there was a difference between the "contact" time of the Usamex process and that claimed by Kearns. The Louisiana District Court held the Kearns patent valid and infringed.

As admitted by petitioner, no appeal was prosecuted by Usamex and a consent judgment was entered in 1978 based on the District Court opinion and Usamex took a license. (App. 96a)

Shortly thereafter, petitioner brought this action against respondents in the District Court for Kansas. During discovery, petitioner for the first time defined the critical contact time as being the average period the molten ammonium polyphosphate, steam and unreacted ammonia remain in the reactor at 450° F. to 650° F. In point of fact, using petitioner's method of calculating the contact period, the period was the residence time of the fast moving steam in the reactor, not the slower moving melt (which was the material subject to being converted into insoluble form if allowed to remain at elevated temperatures for an excessive time period). (App. 23a)

At least three others had practiced the process of the Kearns patent before the patentee's date of development.

(a) Young of Union Oil at least as early as 1957 reacted wet process phosphoric acid and ammonia in a tubular reactor under conditions such that the contact period was less than a second using petitioner's definition;

(b) Lutz and Rubio did the same thing well before Kearns, again under conditions resulting in a contact period of less than one second as defined by petitioner;

(c) It was also shown that the Getsinger process of TVA had a contact period of less than one second when calculated in accordance with petitioner's definition of such period.

Respondents' process on the other hand involves the utilization of superphosphoric acid as the starting acid, the very material Kearns sought to avoid having to use. The process is carried out such that the residence time of the melt in the reactor is more than one second. Respondents introduced unrebutted evidence at trial that when the total material in the reactor at any one instant in time is trapped and weighed, the weight of such material confirms that the melt is in the tube during the reaction process for more than one second. Such evidence completely refuted petitioner's assertion that the melt was entrained in and traveled at the same speed as the steam.

In 1979, during pendency of this action, Usamex sought review of the Louisiana District Court holding of infringement under Rule 60(b), arguing that its melt residence time was more than one second. There was no contest of the prior holding of validity. Petitioner's contact period definition asserted in this case was not considered by the Louisiana District Court in its reassessment of the infringement question since the parties had entered into a stipulation as to the validity of the patent claims. Based on the representations of petitioner that steam residence time was a valid measure of contact time, the District Court for Louisiana reaffirmed its prior infringement holding. The Fifth Circuit Court of Appeals affirmed the infringement opinion per curiam. Since only infringement was in issue in the 60(b) Motion, the Fifth Circuit decision was not and cannot be said to be in conflict

with the subsequent decision of the Tenth Circuit Court of Appeals in this case holding the Kearns patent invalid.

In like measure, the Tenth Circuit ruling that respondents' use of SPA as a starting acid does not infringe the Kearns patent is not in conflict with the Fifth Circuit decision since Usamex was employing 60% P_2O_5 orthophosphoric acid as a starting acid and the processes are therefore different.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between The Circuits

Petitioner has made Sisyphean efforts to conjure up a conflict meriting review in this case, but its failure is beyond debate. For example, ubiquitous reference is made to the *Usamex* litigation in an attempt to manufacture a conflict under Supreme Court Rule 17, but in fact no such conflict exists.

Rule 17 by its very terms is inapplicable. This rule simply suggests that review may be justified "When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . .". Here, the Tenth Circuit found the Kearns patent to be invalid. And while the Louisiana District Court found otherwise based upon a completely different and inadequate record, it is beyond dispute that the Fifth Circuit did *not* rule on the validity question. Since the Louisiana District Court decision on validity was never appealed, and validity of the patent was stipulated to by Usamex for tactical reasons during the 60(b) proceedings, the issue of validity never in fact reached the Fifth Circuit Court of Appeals. It necessarily follows therefore that the demands of Rule 17 have not been

even remotely met in this petition. The difference in result on the question of patent validity between the earlier District Court decision and the later Court of Appeals holding does not present a reviewable conflict within the strictures of Rule 17, particularly where the records before the respective courts were entirely different.

As another purported conflict requiring resolution, petitioner asserts a need for Supreme Court "guidance" on the doctrine of comity. In fact, such "guidance" has long been available, particularly in the context of patent cases. In *Mast, Foos & Company v. Stover Manufacturing Company*, 177 U.S. 485, 488-89 (1900), the Seventh Circuit held a patent invalid despite a prior contrary decision by the Eighth Circuit. The plaintiff argued that the Seventh Circuit should have followed the judgment of the Eighth on grounds of comity. This Court on review held:

> "Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts. . .

> Comity, however, has no application to questions not considered by the prior court, or, in patent cases, to alleged anticipating devices which were not laid before that court."

That prior decisions of even this Court in patent matters do not carry a conclusive comity effect, particularly when new evidence is brought to attention, is clear and well settled. In *Smith v. Snow*, 294 U.S. 1 (1934), the Supreme Court held a patent covering a method of incubating eggs valid and infringed. Just three years later however, in *Smith v. Hall*, 301 U.S. 216, 218 (1937), this Court held the same patent invalid, noting that differences in the respective records mandated the different result:

> "In view of the definition given to the patent by our decision, the Hastings defense assumed an importance in these suits apparently not attributed to it in earlier litigation, and it has now been developed in the records now before us more fully than in any earlier case."

The lower Courts are in accord, and uniformly hold that comity is not decisive and is in fact irrelevant where new evidence of invalidity is presented. *Phillips Electronic and Pharmaceutical Industries Corp. v. Thermal and Electronics Industries, Inc.*, 450 F.2d 1164, 1176 (3rd Cir. 1971). "Judge Shaw was not bound to follow the Massachusetts court . . . in light of new and persuasive evidence regarding the prior art."; *Johns-Manville Corp. v. Cement Asbestos Products Company*, 428 F.2d 1381 (5th Cir. 1970); and *Imperial Stone Cutters, Inc. v. Schwartz*, 370 F.2d 425 (8th Cir. 1966).

In the present case, both the District Court of Kansas and the Tenth Circuit acknowledged the decisions in

Usamex (App. 37a-39a; App. 17a), but found that new and persuasive evidence of invalidity was brought out that the *Usamex* courts did not hear.

The record amply supports these findings. One important issue which has evolved out of all of the litigation surrounding the Kearns patent is the matter of contact or residence time, which the patent specifies must be "less than one second". In the *Usamex* case, no substantive evidence was presented as to the relevance of the prior art when construed in light of the patentee's meaning of "contact" time as first asserted in this action. In the instant case, it was conclusively established by unrebutted evidence that at least *three* prior art inventors developed APP processes having this short residence time characteristic. Moreover, a number of instances of completely new and previously unconsidered prior art were proven (e.g., the 1957 work of Young and that of Lutz and Rubio). Small wonder then that the Tenth Circuit summarily affirmed the District Court's finding that "The Court believes that a different result on this point [residence time] was reached here simply because the question was fully broached before this Court, as it was not in *Usamex*." (App. 39a)

In short, it is the considerable difference in the proofs and records between the present case and that of *Usamex* which accounts for the different result; and this is entirely consistent with long established principles of comity. And while petitioner fervently argues the *Usamex* case and record (mention is made of this prior litigation no fewer than twenty-four times in a nineteen page brief), the fact remains that it is *this* case and *this* record which are before the Court, not *Usamex*.

Petitioner's plea that added "guidance" on the comity issue is needed to assure more uniform decisions in patent cases has also been totally and completely answered by recent legislation establishing the Court of Appeals for the Federal Circuit. This new Court will, after October 1, 1982, hear all appeals from the District Courts in patent infringement cases. Different results on the validity of a patent among the Circuits will no longer exist—there will be but one national appellate tribunal dealing with patent appeals.

II. This Case Presents No Issues Of Broad Applicability

In reality, the present case is nothing more than a dispute between two private parties concerning very specific facts. This dispute has been resolved by the Court below, and need not be disturbed; nothing of significant and long needed precedential value can come from a review by the Supreme Court.

Just as important, petitioner cannot validly claim that the Kearns patent represents a breakthrough in the art. While petitioner *argues* that Kearns made an epochal discovery, that he "found the way" (Br. 12), this is pure advocacy. The record not only fails to support such a position, but in fact establishes that petitioner's own commercial efforts have been abject failures. Contemporaneous documents, as always, speak louder than self-serving arguments. Petitioner's product is variously referred to in its own company records as "horrible . . . junk", and "consistently . . . inferior"; the product "resulted in sludge back up, clogged nozzles and a lot of other problems", "can't be conveniently stored and used by our customers" and "got so thick it would not pump"; Swift personnel had "always been unable to sell our product to anyone

who was not forced to take it", "pushed our people just as far as they'll go" and "mentioned this business of impurities . . . a hundred times"; and the Swift sales figures were described as "appalling".

Petitioner at one time or another attempted to operate four separate plants, three of which were closed in successive order. Only one small plant remains, apparently kept on stream only for purposes of this litigation.

Thus, the present case not only has no significant public policy aspects, but concerns a patent that is, from a commercial and practical standpoint, of no importance. It is submitted that this Court's jurisdiction and efforts should not be wasted on such a trifle.

III. Petitioner's Assertion Of Denial Of Due Process Is Baseless

In a last-gasp effort to persuade this Court to grant the writ, petitioner alleges that the Courts below invalidated all of the patent claims on an improper basis. Nothing could be further from the truth; and again the record is a more reliable guide to truth than mere argumentation.

Specifically, petitioner in its original complaint alleged infringement of "plaintiff's Kearns 3,464,808 patent." In response, defendants specifically counterclaimed by asking "That U.S. Patent No. 3,464,808 be declared invalid." By virtue of those pleadings, the courts below were obligated to rule on the validity of *all* of the patent claims:

> "The fact that plaintiff put the whole patent in issue by failing to specify any particular claims in its complaint created an 'actual controversy' with respect to all claims . . . when defendant . . . alleged

invalidity of the whole patent in its answer . . . plaintiff cannot now deprive defendant of an adjudication as to all claims of the patent." *Brunswick Corp. v. Outboard Marine Corp.*, 297 F.Supp. 373, 374 (D.C. Wis. 1969); *Sterling Aluminum Products, Inc. v. Bohm Aluminum and Brass Corp.*, 187 F.Supp. 879, 882 (D.C. Mich. 1960), aff'd 298 F.2d 538 (6th Cir. 1962).

The pleadings of course set and control the framework of issues to be adjudicated, and proposed findings, briefs or other subsequent documents do not alter the fact. Hence, petitioner's argument of due process denial can be seen to be nothing more than an afterthought non-issue.

CONCLUSION

Much as it would like to, petitioner cannot overcome the fact that the unrebutted, newly submitted proofs and record of this case totally invalidate the patent in suit; and petitioner's claims of conflict are both ill-conceived and irrelevant.

The Petition should be denied.

Respectfully submitted,

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